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COURT OF CRIMINAL APPEALS
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No. PD-0899-18

IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Patrick Jordan, Appellant

v.

The State of Texas, Appellee

Appeal from Bowie County

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STATE PROSECUTING ATTORNEY'S BRIEF AS AMICUS CURIAE

* * * * *

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant says "[t]his Court has a unique opportunity to examine the law regarding the justification of ones (sic) conduct (the use of deadly force) to avoid a harmful or offensive assault."[1] He is right. This Court has the opportunity to reaffirm that a defendant is justified in using force against another in self-defense only if he believes that person is using or attempting to use force against him.

STATEMENT OF THE CASE

Appellant was charged with aggravated assault of Jordan Royal and a single count of deadly conduct[2] against both Summer Varley and Austin Crumpton.

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[1] App. Br. at 10.

[2] TEX. PENAL CODE § 22.05(b) ("A person commits an offense if he knowingly discharges a firearm at or in the direction of: (1) one or more individuals[.]").

Appellant received a self-defense instruction on aggravated assault but not deadly conduct, at least as it pertains to Varley and Crumpton.[3] The jury hung on the aggravated assault but convicted appellant of deadly conduct.

The court of appeals denied appellant's points of error regarding self-defense to deadly conduct because there was no evidence that anyone other than Royal used or attempted to use deadly force against him.[4] In his motion for rehearing, appellant relied on cases applying or interpreting the "multiple assailants" instruction[5] and concluded he was entitled to a justification defense "regardless of the complainant's (sic) individual actions" because, "[j]ust as the law of parties would extend to those who aid and assist another in the commission of an offense, Summer Varley and Austin Crumpton were a part of the hostile group."[6]

The court of appeals denied his motion for rehearing without opinion. Justice Burgess dissented but agreed with the majority that "there was no evidence that

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[3] The jury was instructed on self-defense to deadly conduct as to Royal's conduct, though he was not the charged victim. 1 CR 140. It is but one of a number of confusing details about this charge and the conference that led to it.

[4] *Jordan v. State*, 558 S.W.3d 173, 180 (Tex. App.–Texarkana 2018), *reh'g denied* (July 24, 2018), *petition for discretionary review granted* (Dec. 12, 2018).

[5] App. Mot. Reh'g at 8 (citing *Frank v. State*, 688 S.W.2d 863, 868 (Tex. Crim. App. 1985), Sanders v. State, 632 S.W.2d 346, 348 (Tex. Crim. App. 1982), *Dickey v. State*, 22 S.W.3d 490, 493 (Tex. Crim. App. 1999) (Keller, J., concurring), and *Dugar v. State*, 464 S.W.3d 811, 817 (Tex. App.—Houston [14th Dist.] 2015, pet ref'd)).

[6] *Id*. at 8-9.

Crumpton and Varley used or attempted to use unlawful deadly force."[7]

SUMMARY OF THE ARGUMENT

Appellant argues that he was entitled to a self-defense instruction against Varley and Crumpton because they were parties with Royal, who was using force. That is not and should not be the law. Entitlement to self-defense must be based on evidence that the defendant at least saw the alleged victim(s) as a threat. His reliance on transferred justification is a corruption of the "multiple assailants" instruction, which informs the jury that it may consider the conduct of other assailants when evaluating the defendant's response to the victim assailant. Regardless of whether this instruction is permitted or even necessary, it does not justify an instruction on self-defense when the victim poses no danger apparent to even the defendant.

ARGUMENT

Appellant's argument is based in the rationale for the multiple assailants instruction as articulated by then-Judge Keller in her concurrence to *Dickey v. State*.[8] It reads, in relevant part:

> The theory behind the multiple assailants charge is that, when it is clear that an attack is being conducted by multiple people as a group, a defendant is justified in using force against any member of the group, even if the recipient of that force is not engaging in conduct that would,

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[7] *Jordan*, 558 S.W.3d at 182-84 (Burgess, J., dissenting). Justice Burgess believed "the question of whether Crumpton was an assailant, and therefore, whether the charge on the right of self-defense was too restrictive as to him, is a closer call." *Id*. at 185.

[8] 22 S.W.3d at 493 (Keller, J., concurring).

> by itself, justify the use of force (or deadly force as the case may be). For example, if a defendant were trapped in a house with several hostile individuals, some of whom were brandishing firearms and threatening the defendant, the defendant may be justified in using deadly force against a different person who was blocking an exit that would otherwise be a viable path of retreat. The use of deadly force against the person blocking the exit would be justified, even though that person possessed no firearms and made no threatening moves, because of that person's complicity with those who threatened the defendant's life. The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants.[9]

This is the last time any member of this Court addressed the multiple assailants instruction, and it is treated by some courts as the legal standard.[10] This Court should reaffirm that self-defense must be predicated on (if not wholly justified by) the conduct of the victim.

I. What this case is not about.

It should first be noted that appellant concludes his brief by conflating justification to shoot at Varley and Crumpton with the absence of recklessness in

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[9] *Id*. The remainder explained that the instruction was unnecessary because the victim "committed an act that, *by itself*, justified the use of deadly force—he reached for his gun." *Id*. She added, "under this record, for the jury to have believed that Brown and Marvis were about to conduct a group assault against appellant, the jury must also have believed that Brown was preparing personally to assault appellant." *Id*. The majority opinion addressed only the lower court's harm analysis.

[10] *See*, *e.g.*, *Dugar*, 464 S.W.3d at 817 (cited as a "see also"); *Echavarria v. State*, 362 S.W.3d 148, 152 (Tex. App.–San Antonio 2011, pet. ref'd) (quoting the entire section above). The last time a majority addressed it was in 1985 in *Frank v. State*, *supra*. In fact, entitlement to the instruction has been reviewed by this Court in only four other cases since the 1974 Penal Code was enacted: *McCuin v. State*, 505 S.W.2d 831 (Tex. Crim. App. 1974), *Matthews v. State*, 582 S.W.2d 832 (Tex. Crim. App. 1979), *Sanders v. State*, *supra*, and *Horn v. State*, 647 S.W.2d 283 (Tex. Crim. App. 1983). *McCuin* was almost certainly tried under the old Code.

doing so.[11] He intimates that this case is also about the unintended consequences of self-defense.[12] He is wrong on both counts.

Although this Court has awkwardly applied self-defense to recklessness, it has done so with an offense that actually requires recklessness.[13] There was no "reckless" question for the jury to decide in this case; the deadly conduct alleged was shooting at or in the direction of the victim(s) knowingly. Moreover, had appellant been charged with a reckless offense against Varley or Crumpton—aggravated assault with a deadly weapon, for example—he could not claim justification for shooting Varley based on Royal's conduct because Section 9.05 forecloses it.[14]

His argument is also internally contradictory. He cannot claim he was justified in knowingly shooting at Varley and Crumpton because of their complicity with Royal and also claim that it was an unintentional/reckless result involving innocent

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[11] App. Br. at 17 ("It is a fact issue for the jury to determine the reasonableness of the defendant's conduct, the participation of any secondary threats or whether the defendant was reckless in the exercise of self-defense.").

[12] App. Br. at 18 ("[T]he citizens and courts of Texas seek guidance regarding the extent of protection that self-defense justifies the conduct of the accused, even against innocent bystanders or as to what quantum of evidence is required to excuse a result of the exercise of self-defense, even if it was not intended against the particular complainant.").

[13] *See Alonzo v. State*, 353 S.W.3d 778, 783 (Tex. Crim. App. 2011) (defendant can raise self-defense to manslaughter).

[14] TEX. PENAL CODE § 9.05 ("Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person."). The Court has yet to reconcile this statute with *Alonzo*.

third parties. If one acts with purpose out of justification, that does not raise recklessness or accident; it does the opposite.[15] Appellant either had a good reason to shoot at Varley and Crumpton in self-defense or he did not. And because the jury found appellant guilty of knowingly shooting in their direction, they implicitly rejected the argument that it was reckless.[16]

II. The test for entitlement to self-defense should be simple.

A defendant's entitlement to self-defense should rise and fall with the evidence—however weak, contradicted, or impeached—that he reasonably believed the person he used force against presented a risk of unlawful force. This can be argued from all of the circumstances, including association with other assailants, but it cannot be based on pure party responsibility. As demonstrated below, the multiple assailants instruction ensures that the conduct of the other assailants is considered when deciding the ultimate question of justification. It cannot be used to make an assailant out of a victim the defendant cannot even claim posed a threat.[17]

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[15] *Alonzo*, 353 S.W.3d at 782 ("not call[ing] . . . into question" cases denying a lesser-included instruction on manslaughter when a defendant testifies he intentionally killed in self-defense).

[16] Appellant testified that, when he fired, he could not see anything: "It was just me and Jordan [Royal]." 4 RR 39. He also admitted to the elements of deadly conduct but "d[id]n't remember" firing his weapon at Varley. 4 RR 45-46.

[17] Such an instruction is unnecessary given how self-defense is treated now and is likely an improper comment on the weight of the evidence. The court of appeals did not reach that point of error and so the instruction's propriety under *Giesberg v. State*, 984 S.W.2d 245 (Tex. Crim. App. 1998), as adapted by *Walters v. State*, 247 S.W.3d 204 (Tex. Crim. App. 2007), is not before this Court.

A. Multiple assailants law requires multiple assailants.

The law of multiple assailants was summarized in this Court's last case on the subject:

> [A] charge which is confined only to the right of self-defense against the deceased is too restrictive if there is evidence that more than one person attacked the defendant. Accordingly, a defendant is entitled to a charge on the right of self-defense against multiple assailants if there is evidence, viewed from the accused's standpoint, that he was in danger of an unlawful attack or a threatened attack at the hands of more than one assailant.[18]

A review of this Court's opinions from 1974 to the present (and cases cited therein) shows that the multiple assailants instruction is a directive to the jury to consider the circumstances surrounding the actions of a victim whom the evidence shows to be an assailant in his own right:

- In *McCuin v. State*, multiple deaths resulted when McCuin and his brother were surrounded by the four Lacey brothers and a melee ensued.[19]

- In *Matthews v. State*, a resisting arrest case, the named victim (and focus of the jury instruction) was the officer but the person striking Matthews—thus requiring self-defense—was a bystander the officer summoned to assist him.[20] The Court called it a "similar situation" to *McCuin*.[21]

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[18] *Frank*, 688 S.W.2d at 868 (citations and quotations omitted).

[19] *McCuin*, 505 S.W.2d at 831-32.

[20] *Matthews*, 582 S.W.2d at 834-35.

[21] *Id*. at 834. It should be noted that resisting arrest has special rules pertaining to the conduct of those assisting the officer. *See* TEX. PENAL CODE § 38.03(a) ("A person commits an offense if (continued...)

- In *Horn v. State*, as in *McCuin*, Horn and his brother got into a fight with another family; Horn was convicted of threatening one of them with a knife.[22]

- In *Frank v. State*, Frank shot and killed his ex-wife when she and her son, Alex, ran up on him in his yard.[23] Frank testified that he was afraid of both of them because of past interactions and knowledge they both carried weapons.[24]

The same is true of the two older cases relied upon by them. In *Black v. State*, the victim and three other armed men came looking for Black.[25] The confrontation resulted in Black being charged for assault with intent to murder.[26] In *Wilson v. State*, Wilson testified that he stabbed the victim, Chapa, multiple times; first when Chapa

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[21](...continued)
he intentionally prevents or obstructs a person he knows is a peace officer *or a person acting in a peace officer's presence and at his direction* from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer *or another*.") (emphasis added), 9.31(c) ("The use of force to resist an arrest or search is justified: (1) if, before the actor offers any resistance, the peace officer (*or person acting at his direction*) uses or attempts to use greater force than necessary to make the arrest or search; and (2) when and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's (*or other person's*) use or attempted use of greater force than necessary.") (emphasis added).

[22] *Horn*, 647 S.W.2d at 284.

[23] *Frank*, 688 S.W.2d at 866.

[24] *Id.* at 866-67.

[25] 145 S.W. 944, 945 (1912). Sanders identified Black as presenting "a detailed explanation of the rationale behind such a multiple assailant charge." Sanders, 632 S.W.2d at 348. Black was also cited in Horn, 647 S.W.2d at 285.

[26] Black, 145 S.W. at 945.

rushed him and again during a fight with Chapa and Chapa's friend, Garcia.[27]

Only one of the cases in this line, *Sanders*, involved a victim who was not committing an overt act of violence when he was assaulted. Sanders and his brother were in a pool hall when he was hit in the head with a cue and chased out by several men.[28] It appears racially motivated.[29] Sanderson, who was among that group but not the person who struck Sanders, was shot after Sanders obtained a gun from his brother in the parking lot.[30] Still, the Court block-quoted *McCuin*, including its reliance on *Wilson*, and referred to *Black* before concluding, "Here the testimony showed an attack by multiple assailants. Appellant was entitled to a charge on self-defense as it relates to multiple assailants."[31]

In all of these cases, then, the evidence was clear or would at least support the rational inference that *the victim* posed a threat that justified self-defense.

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[27] 145 S.W.2d 890, 893 (1940). *Wilson* is cited in *Frank*, 688 S.W.2d at 868, *Sanders*, 632 S.W.2d at 348 (quoting *McCuin*), and *McCuin*, 505 S.W.2d at 832.

[28] *Sanders*, 632 S.W.2d at 346.

[29] *Id*. ("Racial epithets were exchanged."), 347 ("[Sanders's brother] testified that the white people were yelling and hollering and chasing appellant with a pool cue.")

[30] *Id*.

[31] *Id*. at 348. *See also Horn*, 647 S.W.2d at 285 (a defendant is entitled when "at least some testimony showed an attack by multiple assailants.").

B. There's nothing unfair about this.

To say that the evidence must support a finding that the victim was an assailant is not to deny the jury's ability to consider all the evidence when making that determination. Regardless of the propriety of an "apparent danger" instruction, a defendant is permitted to argue he *believed* the victim's attempted use of force was imminent.[32] And the jury may consider all the circumstances, including the conduct of the victim's companions, when assessing that claim and the reasonableness of the defendant's response. But the jury should not be given the option of finding self-defense when there is no evidence the defendant saw the victim as a potential assailant. Requiring proof that the person shot (or shot at) was an assailant does not unduly restrict a defendant's right to self-defense.

C. The plain language of the statutes requires it.

There is no better indication of what the Legislature intended than the language of the statute.[33] Section 9.31 says that "a person is justified in using force against *another* when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against *the other's* use or attempted use of unlawful force."[34] Sections 9.31 and 9.32 provide a comprehensive set of rules for self-

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[32] *Walters v. State*, 247 S.W.3d 204, 212-13 (Tex. Crim. App. 2007).

[33] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

[34] TEX. PENAL CODE § 9.31(a) (emphasis added).

defense, and there is no indication their foundation—reciprocity—can be ignored using general principles of criminal responsibility.

The result might have been different if Sections 9.31 and 9.32 were written in terms of "conduct" rather than "use of unlawful force," as there are multiple ways to make one criminally responsible for the conduct of another.[35] But those culpability statutes focus on convicting a person for the conduct of others; they do not justify otherwise unlawful force based on the conduct of others. Moreover, a justification defense that focuses on the degree of response demands at least some consideration of individualized threat assessment. Treatment of victims as part of a class—even one based in some other legal concept—does the opposite.

It is reasonable to require that an actor perceive the threat of another's unlawful force before justifying the use of force against that person. More so with deadly force. Following the plain language of the self-defense statutes respects the Legislature's prerogative to define defenses. That means requiring that all of the "multiple assailants" be assailants in fact, at least from the defendant's reasonable point of view.

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[35] *See* TEX. PENAL CODE §§ 7.01(a) ("A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."), 7.02(a) ("A person is criminally responsible for an offense committed by the conduct of another if . . . .").

D. Applying the law of parties leads to absurd results.

A "parties" theory of entitlement to self-defense not only ignores the plain language of the statutes but misses the point of justification. As expressed by Presiding Judge Keller, this view of self-defense means that "a defendant is justified in using force against any member of the group, even if the recipient of that force is not engaging in conduct that would, by itself, justify the use of force."[36] If this is correct, there does not have to be evidence that the victim was even apparently an assailant before he is found to be one of multiple assailants. That cannot be right.

Even Presiding Judge Keller's *Dickey* hypothetical presents more than simple transferred justification based on party liability. If an actor is justified under Section 9.32 in using deadly force against someone who prevents him from leaving a room full of gun-toting thugs, it is not because the sentry is legally responsible for the conduct of the others. It is because, based on the circumstances, it is reasonable to believe the sentry posed a threat of unlawful deadly force. If this seems like a poor defense, the answer is not to import the law of parties but to request a necessity instruction; whatever harm was sought to be prevented by making it illegal to shoot an accomplice to unlawful restraint and aggravated assault would arguably be outweighed by the desirability and urgency of avoiding his armed compatriots.[37]

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[36] *Dickey*, 22 S.W.3d at 493 (Keller, J., concurring).

[37] TEX. PENAL CODE § 9.22.

Either way, there is no risk that a defendant in that situation would be denied a claim of legal justification for his actions.

Presiding Judge Keller's concurrence also did not consider how far the proposed transfer of justification would go.[38] What if the victim were a quadriplegic, sitting away from the exit but encouraging the armed thugs through a text-to-speech program à la Stephen Hawking? He would still be guilty as a party to unlawful restraint or aggravated assault. Is party responsibility enough to justify shooting him even if the defendant admits he posed no threat of force, even when the use of force is not justified in response to verbal provocation alone?[39] Let us hope not.

In fairness, *Black* discussed party responsibility at length despite having facts making it unnecessary.[40] But that was 100 years ago and under a different Penal Code. If it ever was truly the case, it should not be the law today that one can justifiably shoot someone for applauding a third person's unlawful conduct.

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[38] This is understandable, given its brevity and the fact that it was unnecessary on the facts of that case.

[39] TEX. PENAL CODE § 9.31(b)(1).

[40] *See*, *e.g.*, *Black*, 145 S.W. at 947 (an actor is justified against all who are "present at the time the difficulty is begun and in any way are encouraging, aiding or advising the real assaulting party and it so appears to the accused"), id. ("The law of conspiracy is not changed because the accused relies upon it as a defensive theory to protect his life or person from serious bodily injury. The law of conspiracy is the same whether sought to be used by either side, and the actions of the conspirators are the same in legal effect.").

The law of parties was noted as an alternative justification for the instruction given in *Horn*, too. 647 S.W.2d at 285 (citing *Misner v. State*, 610 S.W.2d 502, 503 (Tex. Crim. App. 1981), which said a defendant who is guilty only as a party is entitled to self-defense if the primary actor would be).

III. Application

According to appellant's statement of relevant facts, Varley:

- Told appellant via text that he could buy her a drink at a restaurant at which he was stopping.
- Approached appellant and his friend alone, called appellant an asshole, and explained he should not be surprised people were mad at him.
- Was outside with the group when appellant and his friend left the restaurant.
- Tried to pull Royal off of appellant.
- Got shot.[41]

Appellant omits that appellant testified he felt "mobbed" and that he agreed with counsel that all five were "assailants."[42] Ignoring all the favorable evidence about Varley,[43] Appellant says Varley and everyone else with Royal "were participants and changed the dynamics of the situation."[44] He further argues that Varley and Crumpton were "possibly accomplices of Royal by aiding, abetting, encouraging,

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[41] App. Br. at 4-6.

[42] The testimony reads:
Q: You thought you were getting mobbed?
A: Most definitely.
Q: Did you consider all those as assailants?
A: Yes, sir.
4 RR 41.

[43] *See Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017) (evidence supporting self-defense must be viewed in the light most favorable to the defendant). The implausibility of appellant's justification for shooting someone trying to stop his attacker is reserved for a harm analysis should one be needed.

[44] App. Br. at 11 n.5. *See also id*. at 15 (part of Royal's "posse"), 17 (they "were grouped together throughout the afternoon" and "were all participants in the incident in some form or fashion").

supporting Royal's pursuit . . . and the anticipated physical conflict[,]" and even that "Varley was the one initiating Royal's confrontation with Appellant"[45] because she was mad at appellant. But he acknowledges that Varley was not among those who confronted appellant in the parking lot.[46]

Varley's presence plus some alleged encouragement, or even the bare claim that she was an "assailant," should not be enough to justify knowingly shooting at her or in her direction without any indication she posed a (perceived) threat. Her "involvement" did nothing to, in appellant's words, "increase[] the fear factor exponentially" and turn a "school house tussle between two individuals [in]to the fear of a lynching in the streets."[47] Even from appellant's standpoint, nothing she did justified shooting at her.

If Varley was the only named victim, this Court's agreement with that statement would settle the matter. But this case is odd. The deadly conduct charge named two victims, Varley and Crumpton.[48] It is not clear how the analysis proceeds if appellant was entitled to an instruction only as to Crumpton, who played a larger role in the altercation outside. Again, section 9.31 requires consideration of degree

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[45] *Id*. at 14.

[46] *Id*. at 18.

[47] *Id*.

[48] The indictment named Stevenson and Prichard as well, 1 CR 18, but only Varley and Crumpton were named in the jury charge. 1 CR 136.

and their conduct was different.

It is also unclear what role the instruction on self-defense to deadly conduct naming Royal has on the analysis. Again, Royal was not the named victim in the deadly conduct indictment but the jury charge instructs the jury to find appellant not guilty of deadly conduct if appellant's response to Royal's conduct was reasonable. It mirrors the self-defense charge on aggravated assault against Royal.[49] Is this not essentially what appellant wanted—to have his deadly conduct justified by Royal's conduct? It is hard to tell from his proposed charge and the charge conference.[50]

What is clear is that appellant does not direct the Court to any evidence that he believed Varley presented an apparent threat of unlawful deadly force that justified shooting at her.

IV. Conclusion

Appellant ends his brief with the claim that the denial of the desired self-defense instruction under these circumstances left him defenseless and with a trial that was fundamentally unfair. It is not unfair to require some evidence that the defendant perceived a threat of deadly force from someone he claims he shot at in self-defense. If it seems unfair in this case, the problem is with the justification

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[49] 1 CR 139-40.

[50] 1 CR 111-22; 4 RR 105-11. Counsel did refer to the above testimony that appellant was being mobbed. 4 RR 107.

asserted, not the state of the law. If appellant was justified in knowingly shooting at or in the direction of Varley despite her innocence, it could only have been because doing so was immediately necessary and the desirability and urgency of avoiding the harm posed by Royal clearly outweighed the harm the deadly conduct statute seeks to avoid. That is necessity, not self-defense. Appellant did not request a necessity instruction. If that was a mistake, the law of self-defense should not be twisted to fix it.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 4,497 words.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of April, 2019, a true and correct copy of the State's Brief as Amicus Curiae has been eFiled or e-mailed to the following:

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